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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 140.....

VILLAGE OF HAVERSTRAW,
Petitioner,
against
CLYDE POTTS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID PAINE,
Attorney for Respondent.

July, 1940.

The Hamilton Press, 58 Stone St., New York City

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The petition seeks to review the unanimous affirmance by the Circuit Court of Appeals for the Second Circuit (110 Fed. (2d) 58) of the judgment of the District Court for the Southern District of New York upon a jury's verdict, in favor of respondent for $3,500, interest and costs.

Jurisdiction

The grounds for jurisdiction alleged by petitioner are the proceedings below and Section 240 (a) of the Judicial Code, 28 USCA, Section 347, as amended, upon the theory that the decision below has decided a question of local law in conflict with applicable local decisions.

Statement of Action and Decisions Below

This litigation, involving as it now appears $3,500, has been before the Federal Courts nine years. Two trials have been had and three appeals to the Circuit Court of Appeals have been heard.

Respondent, a hydraulic engineer, was employed by petitioner by written contract on July 2, 1928 to render services in connection with the authorization, design and construction of a municipal water supply and distribution system for which respondent was to receive seven per cent of the cost. Respondent prepared the necessary plans for such a system and on September 4, 1928 petitioner's Board of Trustees passed a resolution authorizing the project as planned by respondent. On September 20, 1928 the qualified electors of petitioner approved the action of the petitioner's Board of Trustees. Thereafter, petitioner began a proceeding, as required under the New York Conservation Law, to obtain the approval of the project by the Water Power and Control Commission and respondent rendered services in connection with said proceedings, as all admit. The proceeding was contested by the private water company supplying Haverstraw and surrounding towns. After the first hearing it was adjourned from time to time at petitioner's request, but it lasted for two years, and then petitioner finally abandoned it February 19, 1931. This was occasioned by a change in local administration. The new administration refused to pay respondent anything for services or disbursements.

On June 12, 1931 respondent began an action against petitioner for breach of the written agreement of July 2, 1928 and had a jury verdict of $17,000. Upon appeal the Circuit Court of Appeals (79 Fed. (2d) 102) reversed, on the ground, in sum, that the Village authorities had no power to bind themselves in advance to a contract calling for complete services through the construction of the water works. It was requisite that it have approval of the Commission

before it could construct and that permission might never have been granted. The contract being entire as to consideration, the Court held it could not separate the damages suffered by respondent into two parts, viz., those for services for which petitioner lacked authority to contract, and those where the hiring was authorized.

Therefore, a recovery based upon the written contract was held improper. The Court, however, suggested several times in its opinion (R. 98, 103, 104) in the light of the extensive services which respondent had rendered and of which the petitioner had enjoyed the benefit, that the complaint might be amended to permit a recovery on a *quantum meruit* for services actually rendered, viz.:

> (1) in preparing the requisite engineering data in order that the Village Trustees might determine upon a resolution authorizing such project and a bond issue and of submitting such project and bond issue to the voters; and
>
> (2) in the conduct of proceedings for approval of plans by the New York Water Power and Control Commission.

Thereafter, on April 15, 1936, respondent, in accordance with Section 89 (21) of the Village Law of New York, filed with petitioner itemized bills for his services. More than thirty days thereafter, on June 8, 1936, respondent moved for leave to amend to state a cause of *quantum meruit*. The motion was granted and an amended complaint was served October 10, 1936. Thereafter, upon motion of petitioner, Judge Caffey dismissed the amended complaint upon the ground that the Statute of Limitations was a bar (R. 1).

The Circuit Court of Appeals reversed that order and remanded the cause (93 Fed. (2d) 506; R. 105) for retrial. On February 28, 1938 (R. 2), the petitioner filed its

answer (R. 30) and the case went to trial before Judge Byers and a jury, resulting in the judgment of $3,500, interest and costs here under consideration. Upon petitioner's appeal, the judgment was affirmed. In the court below, the appeal was limited to three questions of law (R. 41) which had been set up as defenses in petitioner's answer, as follows:

> (1) That the filing by the respondent of the notices of claim upon which the action is founded under the amended complaints was an insufficient compliance with the requirements of subdivision 21 of Section 89 of the Village Law;
>
> (2) That no recovery could be had by respondent on *quantum meruit* since the services for which compensation was sought had been rendered pursuant to the unenforceable contract of July 2, 1928, and
>
> (3) That any recovery by the respondent was barred by the Statute of Limitations.

The Circuit Court of Appeals held with respect to (1) that the filing of the bills more than thirty days before the amendment of the complaint sufficiently complied with the statute, since the amendment of the complaint in effect was the commencement of a new action; (2) that it had no doubt respondent might recover on *quantum meruit* for services rendered after the vote of the electors on September 20, 1928 and since petitioner's claim was that respondent could not recover for any services, whether rendered before or after that date, it was unnecessary to decide whether respondent could recover for services rendered prior to September 20th; and (3) that the respondent's services were continuous and that the accrual of the cause of action was a question of fact so that it could not say as a matter of law that the Statute of Limitations had run.

SUMMARY OF ARGUMENT

I. The respondent's bills were filed with petitioner thirty days or more before the action on *quantum meruit* was commenced.

II. The decision below is in accord with New York decisions re Section 128-a of the Village Law.

III. The decision below accords with New York decisions that the approving vote of September 20, 1928, the existence of the power lawfully to employ respondent, supports a recovery for services rendered.

IV. Petitioner's contention that the Court erred in holding that the Statute of Limitations did not bar the action presents no issue for review by this Court.

POINT I

The respondent's bills were filed with petitioner thirty days or more before the action on *quantum meruit* was commenced.

Subdivision 21 of Section 89 of the Village Law provides in part that:

> "* * * no bill or account against the village * * * for * * * services rendered * * * shall be * * * paid, nor shall an action be brought thereon unless such bill or account shall be made out in items, and properly dated with an affidavit attached thereto by the person * * * presenting * * * the same * * *. No action shall be brought upon any such bill or account within thirty days from the time the same was presented to the [Village] board authorized to audit the same."

In this case the respondent filed his bills on April 15, 1936 and more than thirty days thereafter he commenced an action based thereon by amending the complaint on June 8, 1936. Until that date then there had been no

suit on the claim of *quantum meruit* and so the Court held.

McGovern v. *City of New York,* 160 Misc. 714, on which petitioner relies, is not contrary to the result reached below. In that case the plaintiff commenced his action by serving a summons two days after filing his claims. Thirty days subsequent to filing the claims the plaintiff served a complaint. Obviously, the action on that precise claim was commenced within thirty days of the filing of the bills. At p. 715 the Court said:

> "The authorities are uniform to the effect that the purpose of this provision is to permit the city to investigate the validity of the claim and determine whether it desires to pay or settle it without litigation." (Citing cases)

That very purpose would be frustrated if two days after the filing of the claim the suit could be begun as it was in the *McGovern* case, and so the Court said. In the instant case, however, the action on *quantum meruit* was not commenced until more than thirty days had elapsed. True, the action for breach of contract had been begun after proper presentation of the original claim, but the filing of a new claim occurred after the complaint for breach of contract had in effect been dismissed and before permission to amend to a *quantum meruit* was sought and granted. Every protection afforded by the statute was thus granted to the Village.

The petitioner's contention that this *quantum meruit* action was commenced by service of the summons in 1931 in the original action for breach of contract and not by the amendment of the complaint in 1936 is what Judge Hand aptly called "so empty a technicality" (R. 116).

If the *quantum meruit* did not constitute a new cause of action it would have been unnecessary to file a new claim in 1936, since in that case the *quantum meruit* would relate back to the original claim on file. Likewise, the

amended complaint would relate back to the commencement of the original contract action with respect to the Statute of Limitations. The petitioner apparently concedes the truth of this distinction by attempting to assert the Statute of Limitations as a defense, alleging that no services were rendered within six years of the motion to amend the complaint on June 8, 1936 (Petitioner's Br. pp. 4, 23).

This *quantum meruit* action commenced on June 8, 1936, more than thirty days after filing the bills, in complete compliance with the statute on which petitioner relies. That it took the form of an amendment is of no moment. The prolonged discussion of the *McGovern* case by the petitioner does not take into account the distinction so ably presented in the opinion below (R. 116) that respondent could have submitted to a non-suit after the reversal of the judgment on the contract action and could then have begun a new action thirty days after April 15, 1936. The practical difference between that form and the amendment of the complaint was nil since the petitioner had the same defenses in either event. The law of New York does not make crucial, empty technicalities of form when the protection afforded by the statute has been amply assured. Statutes should be given a reasonable interpretation in the light of their purposes. (*People* v. *Ryan*, 274 N. Y. 149, 152.)

The object of filing claims with the municipality is to insure an opportunity to examine the claims and decide whether to defend or not. That purpose was served by the filing here as set forth, but it was not served by the two-day notice given by the claimant in the *McGovern* case. The present case is clearly governed by the language of Judge Lambert in *Vermeule* v. *City of Corning*, 186 App. Div. 206, 210:

> "No complaint having been made to the form of the claim when presented, we must assume, there-

fore, that it accorded to the common council all the information that body desired, and was a sufficient compliance with the technical requirement of the statute." (Affirmed 230 N. Y. 585)

POINT II

The decision below is in accord with New York decisions re Section 128-a of the Village Law.

The burden of petitioner's argument is that Section 128-a of the Village Law had not been complied with when the contract of July 2, 1928 was made, as if this were an action for a breach of contract. Such an argument based on a misconception of the action on *quantum meruit* also overlooks the vital fact that Section 128-a was fully complied with when the electors voted to approve the resolution of the Trustees authorizing the water system (R. 39, 54, 56; Petitioner's Br. p. 2), as the Circuit Court of Appeals pointed out in its first opinion (R. 100, 104). The argument proceeds further that because the services were rendered in attempted compliance with the unenforceable contract of July 2, 1928, recovery in *quantum meruit* would defeat the purposes of Section 128-a despite the vote of September 20th. Of course, the respondent thought he was carrying out his contract when he rendered services. When he sued for breach of the contract, i. e., for his 7 per cent commission, he learned for the first time that the contract was invalid. His judgment of $17,000 was reversed. The instant suit is not under that contract at all. It is simply for the value of certain services. This resulted in a verdict for only $3500. This argument forced petitioner to the position adopted at the trial (R. 39, 40) and in the Circuit Court of Appeals (Petitioner's Br. p. 4) that respondent was not entitled to recover for any services whether rendered before or after September 20th. The Circuit Court quite properly held

the argument unsound; the vote of September 20th was compliance with the statute (R. 117).

This basic misconception of the nature of the action and the vote of September 20, 1928 totally vitiates petitioner's contentions as expressed in its Points II and III. In none of the cases cited does it appear that there was an eventual compliance with the statute involved after an earlier and ineffectual attempt to contract in violation of it. Thus, in *McDonald* v. *Mayor,* 68 N. Y. 23, greatly relied upon by petitioner, it clearly appears that at no time did the head of the Department of Public Works certify to the necessity of the purchase of materials, or that at any time the expenditure was authorized by the Common Council, or that the contract was let pursuant to sealed bids, all of which was required by the statute as pointed out in the opinion of the Court (pp. 25 and 26).

Cases in the Footnote (Petitioner's Br. p. 14) are equally beside the point. Cases in other jurisdictions cited by petitioner can have no application to its contention that the decision of the court below is contrary to New York decisions.

Dickinson v. *The City of Poughkeepsie,* 75 N. Y. 65, required letting of a contract to a low bidder, a qualification which Dickinson was unable at any time to fulfill.

The claim that the decision in the *McDonald* case *supra* outlaws all attempts to recover from a municipality where statutory requirements have not been met, was made and rejected in *Mixer* v. *Adam,* 66 Misc. 238, affirmed 140 App. Div. 919, where it was held that a taxpayer could not enjoin the city from paying the fair value of paving blocks furnished to it pursuant to a contract which did not meet the requirements of the statute. The Court (White, J.) said (pp. 240-241):

> "Carelessly read, some of the cases cited by the plaintiff might seem to sustain his contention, notably the case of McDonald *v.* City of New York,

68 N. Y. 23, in which the opinion of the court is somewhat foggy. A careful judicial examination of that case, however, shows it to be in fact an authority in favor not only of the right but the duty of the city to pay the claim in question. The reason for this statement as to the McDonald case is that in the opinion of the court in that case reference is made to the opinion of the same court, that is, the Court of Appeals, in the case of Nelson *v.* City of New York, 63 N. Y. 535, where the following language was used: 'If the city obtains property under a void contract and actually uses the property and collects the value of it from the property owners by means of assessments, the plainest principles of justice require that it should make compensation for the value of such property to the person from whom it was obtained.' The court in the McDonald case said that the above quoted words distinguished those two cases, and uses the above quoted language with approval and as the law to be recognized in all similar cases; and the case at bar comes squarely within the rule there laid down."

The dicta in *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45 and *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370, are concerned with the unauthorized exercise of power by minor officials, a proposition not involved in this action. The purpose of Section 128-a obviously is to restrict the power of the village to enter into contracts and incur financial obligations unless appropriation is made therefor in the budget or by resolution of the Trustees, approved at a permissive referendum. These conditions are interposed so that the taxpayers may know what the Trustees are doing with public funds. The purpose of the statute was fully complied with when the electors voted on September 20, 1928 to authorize the issuance of $450,000 in bonds for the construction of a water system, and its incidental engineering expenses (R. 39, 58; Petitioner's Br. p. 2).

POINT III

The decision below accords with New York decisions that the approving vote of September 20, 1928, the existence of the power lawfully to employ respondent, supports a recovery for services rendered.

The proposition urged by petitioner in its Point III is new-born. No such claim was made in the Circuit Court of Appeals or the District Court. It is made now only because of the fault inherent in petitioner's argument rejected by the Court below (R. 117), i. e., that in no event could respondent recover for any services whether rendered before or after September 20th (R. 41). The radical departure in the second specification of errors set forth in petitioner's brief (p. 8) from the questions considered below is apparent from the opinion of Judge Learned Hand, who said that the Court could assume that the referendum on September 20th did not ratify the employment

> "because the second of the defendant's three points on appeal is that the plaintiff cannot recover anything whatever for services rendered under the 'illegal contract'; * * *." (R. 117)

Since this Court, on certiorari, will not consider petitioner's contentions which it failed to assign as error in the Circuit Court of Appeals (*Sonzinsky* v. *United States*, 300 U. S. 506; *Various Items* v. *United States*, 282 U. S. 577; *Burnett* v. *Commonwealth Improvement Co.*, 287 U. S. 415), it is difficult to see how this belated argument can aid the petition for certiorari. It will, however, be briefly discussed.

Admittedly, the vote of September 20, 1928, pursuant to Section 128-a, authorized the petitioner's Trustees to proceed before the Water Power and Control Commission; respondent rendered services before the Commis-

sion as well as in assisting the Village Trustees in determining upon a resolution authorizing the project, etc. It is, therefore, not pertinent to argue that the contract of July 2, 1928 was in violation of Section 128-a. For after the vote on September 20th approving the Trustee's resolution of September 4th, Section 128-a no longer applied.

The petitioner proceeds upon a false premise—that a person can be employed only by written contract. The absurdity of this notion is plain. A contract for employment may be express, oral or implied. While the express contract of July 2, 1928 may not have been enforceable because of Section 128-a, the respondent's services in assisting the petitioner to comply with that section created an implied contract under which respondent is entitled to recover for assisting the Village in determining upon the resolution. When on September 20th the resolution was adopted by the electors, Section 128-a was fully complied with and the value of respondent's subsequent services before the Commission were recoverable on implied contract. Thereafter, Section 128-a had no application, as was pointed out in both the first and third opinions of the Circuit Court (R. 103-104, 117).

Petitioner misconceives both the necessity for and the theory of ratification. It was not necessary that the vote of September 20th ratify the contract of July 2nd. The judgment, which the petitioner contests, was not based upon a contract but on *quantum meruit* only for the value of the services which were authorized.

The case of *Coggeshall* v. *Hennessey,* 279 N. Y. 438, is decisive on this point. Here the town of Mount Pleasant retained an attorney to conduct litigation over a purchase of certain land and water rights. The litigation lasted four years. Then the attorney submitted a bill for services. An item to cover this bill was inserted in the budget. In an action brought by a taxpayer, it was argued that the Town Law required that no indebtedness could be

incurred unless it was included in the estimate for that year, or, in other words, that each year of continuous litigation the estimate must include the fees and allowance for counsel estimated in advance.

Section 118 of the Town Law is the provision for towns comparable to Section 128-a of the Village Law, and it requires that no liability may be incurred

> "unless provision therefor shall have been made in the annual estimate, and in no case in excess of the amount appropriated for such year. * * * Any contract, verbal or written, made in violation of this section, shall be null and void as to the town * * *."

Since the services were rendered by the attorney in the years prior to the estimate, it was contended that the attorney could not be paid. The Court of Appeals rejected the argument, saying at page 444 (Crane, Ch.J.):

> "We do not construe this law as requiring any such strict construction. The value of the services performed in one year could be included in the budget for the next, provided they are reasonable."

The only difference between Section 118 of the Town Law and Section 128-a of the Village Law is that in addition to previously estimating the money for a liability, an alternative method is provided in the latter by a resolution which may be approved by the electors. In the case at bar the alternative method was used and it is clear that the election on September 20th constituted compliance with the statute.

In addition, petitioner's argument that *the contract* was not submitted to the electors is specious. Section 128-a does not require that a contract be submitted, but merely that a resolution to borrow money be approved and this admittedly was done.

Nothing in petitioner's brief indicates that the Court below departed from the New York decisions. The cases

cited dealing with instances where there was no compliance with the statute are not in point. At page 19 of its brief, petitioner emphasizes that the Court below cited no authorities for its statement that "the earlier unauthorized attempt to contract with the person so employed did not prevent the law from raising an obligation to pay him * * *." This is so well known that no citation was justified. Authorities for it are in all the books.

For example, *Vermeule* v. *City of Corning,* 186 App. Div. 206; affirmed 230 N. Y. 585. There the plaintiff rendered services to the City in connection with its water supply at the request of the Board of Public Works. After the completion of the services the City refused to pay. The Court (Lambert, J.) held that in fact the Board of Public Works had no authority to employ the plaintiff and that its expenditures were limited to moneys appropriated by the Common Council. The Court assumed that the plaintiff's contract was unenforceable and void, but it held that the Common Coucil had the right to employ an engineer to perform the services which were rendered by plaintiff. At pp. 208-09 the Court said:

> "* * * the common council, although not initiating the contractual arrangement, having power to do so, had the power to adopt the action of the board of public works and ratify the contract thus sought to be made.
>
> * * * * *
>
> "Under these circumstances, the municipality having received the benefits of plaintiff's services should pay the agreed sum therefor, unless some reason sound in law prohibits its recovery."

Whereupon the Court reversed the judgment below and directed judgment for the plaintiff for the full amount, and this, as already stated, was unanimously affirmed by the Court of Appeals.

Peterson v. *The Mayor of New York,* 17 N. Y. 449, confirms the doctrine already stated. There an architect was

employed by the Committee on Markets of the Board of Aldermen to draw plans for a new market. They were presented to the Common Council and a resolution passed authorizing the erection of the market upon the plans. The suit was for services. The Court held, per Denio, J., that the Committee had no authority to employ the plaintiff but that the Council had adopted the plans and put them in use providing for the erection of the building, and the City must pay for them. He wrote (p. 453):

> "Assuming then that these services might have been lawfully performed at the expense of the city, by a person directly employed by resolution of the common council, and that they have, in fact, been performed by the plaintiff, under an officious employment by a committee of one of the boards, the question is, whether the adoption of the plans, and using them to the extent which has been shown, binds the city to pay for them. * * * Chancellor Kent says, the doctrine that corporations can be bound, by implied contracts, to be deduced by inference from corporate acts, without either a vote or deed or writing, is generally established * * * with great clearness and solidity of argument (2 Comm., 291)."

To the same effect:

> *People* v. *Flagg,* 17 N. Y. 584, 587;
> *Nelson* v. *Mayor,* 63 N. Y. 535;
> *Moore* v. *Mayor,* 73 N. Y. 238, 248;
> *Matter of Shaddock* v. *Schwartz,* 246 N. Y. 288, 294.

It is a rule of everyday honesty that when one renders services and incurs expenses in good faith relying on an apparently valid agreement, he shall not be turned away empty handed. He can sue for and recover the value of his services even though the Court cannot enforce the agreement itself.

POINT IV

Petitioner's contention that the Court erred in holding that the Statute of Limitations did not bar the action presents no issue for review by this Court.

The petitioner does not seriously urge that the holding of the Court below with respect to the Statute of Limitations is in conflict with applicable New York decisions. Indeed, the petitioner resorts to the argument that a continuing employment cannot be implied.

The only case cited for this proposition is *Thacher* v. *N. Y., W. & B. R. Ry. Co.*, 153 App. Div. 186. This case has no bearing here. It involved a contract absolutely "void under the Statute of Frauds" (153 App. Div. 189-190) which was sought to be made the sole basis of recovery in *quantum meruit* for the very same damages which would have been recoverable in an action on the contract itself. Furthermore, in order to escape the bar of limitations by proof of continuous services within the statutory period, plaintiff offered no evidence other than the illegal contract itself.

In the case at bar no reliance was placed on the contract of July 2nd, either as establishing the measure of respondent's damages or for the purpose of tolling the Statute of Limitations. In fact, a long trial was necessary for the presentation of evidence *aliunde* the contract covering these many points. This evidence was commented on by Judge Byers in his charge (R. 75, et seq.).

Judge Byers charged the jury (R. 70-72) that there was no written contract involved, but that the jury might find that there was an implied contract and that the jury could not find for the respondent unless they also found that his services continued until February 19, 1931 (R. 73-74).

Thus, the jury found, as a matter of fact, that the

respondent's services continued until 1931. The undisputed evidence sustained this (R. 42-53). The Circuit Court of Appeals affirmed (101 Fed. (2d) 58). This was simply a question of fact resolved against petitioner both by the jury and the Circuit Court of Appeals. It is not an open question on an application for certiorari.

General Talking Pictures Corp. v. *Western Electric Co.,* 304 U. S. 175;
United States v. *O'Donnell,* 303 U. S. 501;
United States v. *State Investment Co.,* 264 U. S. 206.

CONCLUSION

The petition is without merit and should be dismissed.

Respectfully submitted,

DAVID PAINE,
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July, 1940.